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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931

JESSE H. DENTON,
Petitioner,

vs.

No. 242.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

H. D. MINOR,
CHARLES N. BURCH,
For Illinois Central Railroad Co. and The Yazoo & Mississippi Valley Railroad Co., Respondents.

R. V. FLETCHER,
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Of Counsel.

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This is a suit by petitioner Denton against The Yazoo & Mississippi Valley Railroad Company, the Illinois Central Railroad Company and Jim Hunter, a negro porter, to recover damages on the ground that petitioner, a railway mail clerk, was injured through the negligence of Hunter while he and Hunter were jointly engaged in loading sacks of mail on a railway mail car at Jackson, Mississippi—he being in the car and Hunter on the mail truck (p. 38). There was a judgment for petitioner against all three defendants for $12,000. On appeal to the Supreme Court of Mississippi, the judgment was affirmed as to Hunter but reversed as to the two railroad companies and the suit dis-

missed as to them. Thereupon this petition for certiorari was filed.

Among other defenses, the railroad companies set up the proposition that, while engaged in the work of loading, Hunter, the negro porter, was a servant of the federal government and for his negligence they were not responsible. In other words, the defense was the "lent servant" doctrine—this pursuant to the postal regulation presently to be quoted to the effect that the railroad companies should furnish the men necessary to load the mails into the cars "under the direction of the transfer clerk or clerk in charge of the car." The State Supreme Court sustained this defense and held that Hunter was, *pro hac vice,* the servant of the federal government and not of the carriers (pp. 222-224).

Yazoo, etc., R. Co. v. Denton, (Miss.) 133 So. Rep. 656.

BRIEF.

1. "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States *in the manner, under the conditions, and with the service prescribed by the Postmaster General.*"

29 Stat. 429, Sec. 5, subd. 27.
39 U. S. C. A., Sec. 541.

2. Pursuant to this authority and duty, the Postmaster General promulgated, among others, the following regulation:

> "Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of the railway postoffice cars and to load and pile the mails in and unload them from

storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty."

U. S. Postal Laws & Regulations of 1924, Sec. 1295, par. (2).

Record, p. 14.

3. The regulation just quoted required nothing further of the carrier than that it furnish the men necessary for the purposes indicated and expressly provided that such men, in the performance of that work, should be "under the direction of the transfer clerk or clerk in charge of the car, if one is on duty."

4. The record affirmatively shows that at the time of the injury there were in the mail car both a transfer clerk and a clerk in charge of the car. As to this, there is no controversy.

Record, pp. 40, 137.

5. The injury resulted from the manner in which Hunter, the porter, standing on the mail truck, was placing the sacks of mail into the mail car where they were received and placed by the plaintiff.

Record, pp. 38-39.

6. The porter, Hunter, was, while doing this work, the servant of the federal government and not of the carrier, wherefore the doctrine of lent servant applies.

Record, p. 137.

Y. & M. V. R. Co. v. Denton, 133 So. Rep. 656.

Standard Oil Co. v. Anderson, 212 U. S. 215.

Linstead v. C. & O. R. Co., 276 U. S. 28.

Harrell v. Atlas Co. (C. C. A.), 250 Fed. 83.

Burgess v. Standard Oil Co. (C. C. A.), 262 Fed. 767.

Isaacs v. Prince, 133 Miss. 205.

Carr v. Burke, 131 N. Y. App. Div. 361.

ARGUMENT.

A review of the federal statutes and of the postal regulations makes clear the respective duties of the government and of the carriers in the handling of mails. The carriers' primary duty is that of transportation, including the furnishing of transportation facilities. The government's primary duty is that of handling the mail while it is in the mail car and after transportation is complete. Intermediate between these two primary duties is the matter of loading and the regulation above quoted makes it perfectly clear that there is no duty on the part of the carrier to load the mails into the car, but merely to furnish the men necessary for that purpose.

The practical construction placed by the government and the carriers alike upon these regulations—exhibited in the case at bar—is that the men furnished by the carrier shall be on the outside of the car and hand up the mail sacks to the government clerks who are in the car. As to how this shall be done, men furnished by the carrier are entirely under the direction and control of the government clerk in the car.

This being true and there being no contemplation whatever that the carrier shall superintend and direct the work of the men it is required to furnish, it necessarily follows that the porter in the case at bar was clearly the servant of the government and not of the railroad company during the work of loading. He could have had no instructions from the carrier as to the manner of doing the work *except to obey the directions of the mail clerk.*

And such is the testimony here. The carrier's station master said:

"Q. When he (Hunter) was loading and unloading the mail down there in the car, under whose direction and supervision was he?

A. The transfer clerk and the clerk in the mail car in the United States post office.

Q. Did you leave it to them as mail men to control him and direct him how he should load and unload the mail?

A. Yes, sir.

Q. All the details of that work, the supervision of it, how he did it and what he did, which he loaded first, and how fast he loaded it, did you have any, or did you attempt to exercise any control over that at all?

A. Not a bit in the world. I am busy at other points and I don't stay at one mail car."

Record, p. 27.

Hunter, the porter, testified:

"Q. If you have two or three different kinds of mail on your truck, pouch mail, sacks of mail, boxes, parcel post, and you start to loading one kind, say you start to loading a sack of mail first, and this man tells you to wait, Jim, 'I want you to load that pouch mail first,' do you have to do that?

A. I have to do just what that man tells me to do, the man standing in the car.

Q. Whatever the man in the car tells you to do, what is what you do?

A. Yes, sir.

Q. You do that all the time?

A. Yes, sir.

Q. The man in the car there is your boss so far as loading that mail?

A. As long as I am loading that car, he is my boss." Record, p. 165.

The case of Standard Oil Co. v. Anderson, 212 U. S. 215, is, with the exception of Driscoll v. Towle, 181 Mass. 416, the sole authority relied upon by the petitioner here. In that case the court refused to apply the lent servant doctrine, but the decision rested upon the peculiar facts involved. Plaintiff there was a longshoreman employed by T., a master stevedore, who, under contract with defendant, Standard Oil Co., was engaged in loading a ship with oil. While working in the hold, he was, without fault on his part, struck and injured by a load which was unexpectedly lowered by a winchman. The accident happened because the winchman negligently failed to observe certain signals. The question, therefore, was whether this winchman was, at the immediate moment, a servant of the defendant, the owner of the vessel, or the stevedore who had contracted to load it. It is quite important to note that the work out of which this accident happened *was that of hoisting.* After reciting this situation and reviewing the authorities, the Court said:

"Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman, at the time he negligently failed to observe the signals, engaged in the work of the master stevedore,

under his rightful control, or was he rather engaged in the work of the defendant, under its rightful control? We think that the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reaon. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do *the work of hoisting* itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, *under its own control.*"

Standard Oil Co. v. Anderson, 212 U. S. 225.

Manifestly that situation is not analogous to that here presented.

In Driscoll v. Towle, 181 Mass. 416, the defendant had agreed with the Electric Light Company to perform certain transportation for the latter by horse and wagon and, to that end, furnished horse, wagon and driver. While hauling material of the Light Company to a destination indicated by it, the driver injured the plaintiff. The Court held the defendant liable, declining to apply the lent ser-

vant doctrine on the ground that while the Light Company had the right to tell the driver what material he should carry and to what destination, the driver remained *"subject to no orders but those of the man who pays him."* The Court added:

> "Of course, in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way and the orders which he receives simply point out to him the work which he or his master has undertaken to do."

In other words, the defendant was really an independent contractor with respect to certain services to be rendered the Light Company, the latter having no right of control beyond indicating the service it desired. A different result would have followed if the contract between the defendant and the Light Company had expressly provided that, while driving the wagon, defendant's servant should be under the direction of the representative of the Light Company.

In the case at bar, the obligation of the carrier was merely to furnish men who, as to the manner of doing the work in question, were subject to the orders of the railway mail clerk alone. That clerk was at the scene—no representative of the carrier was present.

The instant case is more like that of Linstead v. C. & O. R. R., 276 U. S. 28. There, Linstead was a conductor in the employ of the "Big Four" Railroad but at the time

of his injury was working on a freight train running on the tracks of the C. & O. R. R. Co. Suit for his death was brought against the latter company and the question in the case was—for whom was he working when killed, the C. & O. or the Big Four? He was a conductor regularly in the employ of the Big Four, but by an arrangement between the Big Four and the C. & O., the Big Four lent to the C. & O. a locomotive, caboose and train crew to take freight trains from Stevens, Ky., to Riverside, Ohio, over the rails of the C. & O., and paid therefor by reciprocal service. When the Big Four train crew ran on the track of the C. & O. they were under the supervision and control of the train master of the C. & O. The Big Four train crew was not subject to discharge by any officer of the C. & O. and were paid by the Big Four. While running as conductor on the track of the C. & O., under the conditions stated, Linstead was killed in a collision between his train and another train of the C. & O. Dealing with these facts, the Court pointed out that the work being done

> "was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done *under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road.* We do not think that the fact that the Big Four road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job."

Linstead v. C. & O. Ry., 276 U. S. 34.

This, we say, is a sufficient answer to the argument of petitioner based on the fact that the defendant carriers here employed Hunter, paid him, and alone had the right to discharge him.

The determinative point is that, at the time of the injury, Hunter was working under the direction and control of the Post Office employes who, under post office regulations, had the sole right to direct and control him while loading sacks of mail into postal cars. The evidence shows that in the loading of mail into postal cars, Hunter, as a matter of fact, was directed and controlled solely by these Post Office employes. The carriers maintained no one of their officers at mail cars to supervise and direct the work of Hunter. This was left to the Post Office employes. In other words, not only did the postal regulations require Post Office employes to supervise and direct Hunter and to control him, but this was also the actual practical construction and application of the postal regulations.

Whose was the work here to be performed? It was the handling of mail, the work of the federal government, pursuant to express constitutional authority and to a duty imposed by Congress. The government, through the agency of its Postmaster General, had expressly directed that the duty of the carrier in regard to loading was merely to furnish men to work with and under the supervision of the government clerk in the car—thus, by clear inference, withdrawing such men for the time being from the service and control of their regular master and subjecting them solely to the control and direction of the government clerk in charge of the car.

In Harrell vs. Atlas Cement Co. (C. C. A.), 250 Fed. 83, the railroad company was transporting rock from the cement company's quarry to its plant, and employes of the railroad company who took loaded cars from and emptied cars to the quarry, particularly over the track of the cement company, worked in conjunction with that company's servants in loading and removing the cars. All were under the direction of the cement company. The Court, in an opinion by Judge Sanborn, held that railway employes, though hired and paid by the railroad company, were, in the course of such work, to be regarded as servants of the cement company and fellow servants of the employes of that company. The case of Standard Oil Co. v. Anderson, 212 U. S. 215, was reviewed and the Court pointed out that the holding of that case would not apply for the reason that in the instant case "the cement company had and was exercising the exclusive power to control and direct how, when and where he (plaintiff) should do his work."

Harrell v. Atlas Cement Co., 250 Fed. 83.

Petitioner quotes and relies on two other postal regulations which read:

"Section 1286, Par. 5.—Any person acting for an advantage to himself or another, by authority or consent of the railroad company, and the representing in any manner the interests of the company or railroad in its business transaction with the public, will be regarded as the company's agent or representative.

"Section 1288.—At places where railroad companies are required to take the mails from and deliver them into post offices or postal stations or to transfer them

to connecting railroads the persons employed to perform such service are agents of the companies and not employees of the postal service, and need not be sworn. . . . ''

Even if these provisions would otherwise apply to the situation here involved, it is a sufficient answer to point out the familiar rule that in the construction of these regulations, as in the construction of statutes, a regulation general in character will not prevail over a specific regulation covering the particular matter in question.

> ''The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *Generalia specialibus non derogant.* 'The general principle to be applied,' said Bovill, C. J., in Thorpe v. Adams, L. R., 6 C. P., 135, 'to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together.' ''
>
> Ex Parte Crow Dog, 109 U. S. 556.

However, it is quite plain that the two regulations just quoted do not apply and were not intended to apply to the situation here. The carrier is not required to do or even to superintend the work of loading, but merely to furnish men therefor who shall work under the direction of the government clerk.

It cannot be true that the carrier is responsible for the manner in which Hunter did his work of loading when the right to supervise and direct that manner had, by an express regulation of the government, been withdrawn from the carrier and placed in the postal clerk in charge of the car.

We respectfully ask, therefore, that the petition for certiorari be denied.

Respectfully submitted,

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(All italics ours.)